STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2014
v	No. 315021 Berrien Circuit Court
CHRISTOPHER LAMONT PIERCE, Defendant-Appellant.	LC No. 2012-001483-FC

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant, Christopher Lamont Pierce, appeals as of right his convictions, following a jury trial, of seven counts of first-degree criminal sexual conduct.[1] The trial court sentenced him to serve six concurrent terms and one consecutive term of 25 to 75 years' imprisonment. We affirm.

I. FACTS

A. BACKGROUND FACTS

Pierce and Patricia Pierce were married until 2011 and had two biological children together. The Pierces also adopted four children. The Pierces separated in March 2011 and eventually divorced.

According to Patricia Pierce, on the morning of April 4, 2012, her youngest son told her that Pierce had done "private part stuff" with him. When she asked the son if anybody else knew, he told her that one of his sisters knew. Patricia Pierce called her daughter into another part of the house and asked if Pierce did similar things with her. The daughter responded affirmatively. Patricia Pierce contacted the police, and all six children were assessed at the Berrien County Children's Assessment Center, which provides forensic interviews.

[1] MCL 750.520b(1)(a) (sexual penetration with a person less than 13 years old).

B. WITNESS TESTIMONY

At trial, the daughter testified that Pierce began touching her inappropriately when she was 4 or 4-1/2 years old. She testified that the touching later turned into fellatio and instances in which Pierce made her look at pornography on his computer or telephone while he did "bad stuff" to her. The daughter detailed locations and time frames in which specific instances of sexual abuse occurred. The son also testified about specific instances of sexual abuse at various locations.

Both children testified about an incident at Pierce's workplace. The daughter testified that Pierce took her and her brother to his workplace on a Saturday, when it was empty, and made them perform fellatio on him in the bathroom. The son testified that Pierce took him and his sister to Pierce's work place and showed them different rooms and trucks, then took them to the bathroom and "put his bad spot" into their mouths. Pierce testified that the incident did not occur and that his oldest son was with him and the children at the workplace.

The son testified that he told Patricia Pierce about Pierce's sexual abuse because it had been bothering him. He testified that he did not previously talk about it because Pierce told him not to and Pierce would get angry when the children told on him.

The daughter testified that she did not tell anyone because Pierce told her that he would hurt her if she did. The daughter testified that she thought about saying "no" when Patricia Pierce asked her whether Pierce had "done bad things" with her and her brother because she was afraid of what Patricia Pierce would think. The daughter testified that she said "yes" because she thought it was the right thing to do.

On cross-examination, defense counsel asked the daughter why she had not previously told Patricia Pierce about the abuse. She testified that she was afraid that Pierce would hurt her. Defense counsel asked whether there was anyone else she thought she could tell, and she responded no. Defense counsel asked if she ever would have told anyone and she responded that she would have told someone later. The daughter elaborated that she was going to wait until she was 13 because she was "building up like the courage . . . ." Defense counsel did not cross-examine the son.

Barbara Welke, a forensic interviewer, testified that it is not uncommon for children to delay disclosing sexual abuse or to disclose it incrementally because of fear, embarrassment, or other reasons. Welke testified that this occurs even in cases where the child has a person that he or she trusts.

Pierce denied sexually abusing his children. Pierce testified that he has anger issues and that his children had reasons to be afraid of him. Pierce testified that he did not believe that Patricia Pierce had fabricated the allegations, and that he did not know why his daughter and son "would say these things."

C. MEDICAL TESTIMONY

Patricia Pierce testified that she saw blood in the daughter's urine in May 2006, when the daughter said that she fell off her bike. According to Patricia Pierce, the daughter continued to

have symptoms that resembled a urinary tract infection and she took the daughter to the doctor. Dr. James Kroeze, the daughter's physician, testified that the daughter had complained of urinary tract problems before the Pierces adopted her. Patricia Pierce testified that the daughter's doctors believed that she might have a urinary tract infection and prescribed antibiotics. Dr. Kroeze testified that he did not suspect that the daughter was abused.

Patricia Pierce testified that, in March 2010, the son complained about blood in his stool and told her that he fell off his bike. She examined him but did not find anything wrong. The son testified inconsistently about the incident and stated that he did not remember it.

Angela Mann, a certified sexual assault nurse examiner, testified that she examined the daughter and son in April 2012. According to Mann, she had trouble examining the daughter because she had pain and redness in her vagina. Mann diagnosed the daughter with a bacterial vaginitis, an infection. Mann testified that this type of infection is rarely found in people who are not sexually active, but it may possibly occur without sexual activity. Mann testified that she could not state whether the daughter's hymen was damaged. Mann also had concerns about anal redness and an area of thick tissue. Mann testified that the son had pinworms, which cause itching, but nothing else of note. Mann testified that the children's symptoms were consistent with sexual penetration, but were also consistent with other medical issues. Defense counsel did not cross-examine Mann.

D. CLOSING ARGUMENTS

In closing, the prosecutor argued that the children's secret "was a powerful and terrifying thing" for them. The prosecutor later argued, "Imagine the shock, the horror, and embarrassment you'd feel having to watch your dad do that to your brother or sister." The prosecutor also argued that, when the daughter testified, "[y]ou believed her."

Defense counsel argued that the prosecutor had failed to present contrary evidence that, when the daughter and son were at Pierce's workplace, Pierce's oldest son was with them. In rebuttal, the prosecutor argued that Pierce's oldest son was not one of the prosecutor's witnesses and that the defense could also produce witnesses. The prosecutor continued, "Where's [the oldest son] to say he was there that day. That's on them. . . ."

The jury found Pierce guilty of seven counts of criminal sexual conduct.

II. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

The defendant must "timely and specifically" challenge prosecutorial misconduct before the trial court to preserve his or her claim.[2] We review unpreserved claims of prosecutorial

[2] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

misconduct for plain error.[3] An error is plain if it is clear or obvious, and the error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.[4]

B. LEGAL STANDARDS

A prosecutor can deny a defendant's right to a fair trial by making improper remarks that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."[5] We must evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor's comments in context and in light of the defendant's arguments.[6]

C. SYMPATHY FOR THE DAUGHTER

Pierce contends that the prosecutor committed misconduct when she sought to evoke sympathy for the daughter by stating that the children's secret was "powerful and terrifying" and by encouraging jurors to place themselves in the children's' shoes. We disagree. Taken in context, we conclude that the prosecutor's statements were not attempts to evoke the jury's sympathy.

A prosecutor may not ask jurors to sympathize with the victim or place themselves in the victim's position.[7] Here, the prosecutor's statements were part of a longer argument in which she argued that the daughter was frightened and alone and thus unable to confide in anyone. This argument responded to defense counsel's attack on the daughter's credibility during cross-examination, in which defense counsel questioned the daughter at length about why she had not told anyone about the abuse. When read in context, the crux of the prosecutor's argument was not that the jury should sympathize with the daughter, but that it should find her credible.

Further, we will not find error requiring reversal if a curative instruction could have alleviated the effect of the prosecutor's misconduct because curative instructions are "sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements" and because we presume that jurors follow their instructions.[8] Isolated statements that are not blatant are unlikely to be so prejudicial that a jury instruction could not have cured them.[9]

---

[3] *Unger*, 278 Mich App at 235; *Brown*, 279 Mich App at 134.

[4] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[5] *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974). See *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995).

[6] *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

[7] *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). See *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999).

[8] *Unger*, 278 Mich App at 235.

[9] See *Watson*, 245 Mich App at 591.

We conclude that, even if the prosecutor's statement was an improper appeal to the jury's sympathy, there is no indication that a prompt objection and curative instruction would have insufficiently cured the statement's prejudicial effect. Here, the prosecutor's remarks were isolated. They were not blatantly prejudicial, but were instead part of a larger, proper argument regarding the daughter's credibility. And the jury was later instructed that it should not base its decision on sympathy. Under these circumstances, we conclude that even if the prosecutor's arguments were improper, they did not affect the outcome of Pierce's case.[10]

We conclude that these statements do not constitute plain error affecting Pierce's substantial rights.

D. THE DAUGHTER'S CREDIBILITY

Pierce contends that the prosecutor committed misconduct when she improperly bolstered the daughter's credibility by encouraging the jury to believe that she was telling the truth. We disagree.

The prosecutor may argue from the facts that a witness should or should not be believed.[11] Here, in context, the prosecutor argued that

> [w]hen [the daughter] talked, you believed her. You saw her. You saw her demeanor. You heard her voice. You heard her answer the questions. In your head and in your heart you believed her.

The prosecutor then followed several recitations of what the daughter had testified to by repeating, "you believed her."

The prosecutor commented on the daughter's demeanor, the daughter's consistent time frames of abuse, the consistency of her testimony with the son's, and the detailed nature of the daughter's testimony. When reading the prosecutor's statements in context, it is clear that the prosecutor was arguing that the jury should find the daughter credible. The prosecutor's argument was proper because the prosecutor may argue that the jury should believe a witness.

We conclude the prosecutor's repeated statements to the jury that "[y]ou believed her" did not constitute plain error because they were proper credibility arguments.

---

[10] See *Cooper*, 236 Mich App at 653-654 (Concluding that any error was not clear error when ". . . the crux of the prosecutorial argument was proper, [and] any arguable impropriety . . . could have been cured by a cautionary instruction . . . .")

[11] *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

E. FAILURE TO CALL THE OLDEST SON

Pierce contends that the prosecutor improperly shifted the burden of proof to the defense by arguing that defense counsel could have called Pierce's oldest son to testify. We disagree.

Generally, a prosecutor may not shift the burden of proof by commenting on the defendant's failure to testify or present evidence.[12] But a prosecutor may comment on the defendant's failure to call a witness as long as the argument does not involve the elements of an offense and does not burden the defendant's right not to testify.[13]

Here, in closing, defense counsel contended that the prosecutor had not rebutted Pierce's testimony that his oldest son was with him and the complainants on the day they alleged that he abused them at his workplace. In rebuttal, the prosecutor responded that defense counsel had not called the oldest son to corroborate Pierce's testimony. This argument did not involve an element of the offense and did not burden Pierce's right to testify. Because the prosecutor may comment on a defendant's failure to call a corroborating witness and may respond to defense counsel's arguments, we conclude that this argument was proper.

We conclude that the prosecutor's argument that Pierce did not call his oldest son to testify did not constitute plain error because it did not unfairly shift the burden of proof to Pierce.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Generally, this Court reviews a defendant's claim of ineffective assistance of counsel by reviewing for clear error the trial court's findings of fact and reviewing de novo questions of law.[14] But a defendant must move the trial court for a new trial or evidentiary hearing to preserve a defendant's claim that his counsel was ineffective.[15] When the trial court has not conducted a hearing, our review is limited to mistakes apparent from the record.[16]

---

[12] *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

[13] *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995).

[14] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[15] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Unger*, 278 Mich App at 242.

[16] *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds, 493 Mich 864 (2012).

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[17] To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.[18]

The defendant must demonstrate that, in light of the circumstances, counsel's "acts or omissions were outside the wide range of professionally competent assistance."[19] The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.[20] Defense counsel has broad discretion in matters of trial strategy.[21]

C. FAILURE TO CROSS-EXAMINE

Pierce contends that defense counsel was ineffective for failing to cross-examine his son. We disagree.

When considering an unpreserved claim of ineffective assistance of counsel, we must consider the possible reasons for counsel's actions.[22] There are several valid reasons why an attorney might not cross-examine a young child who was allegedly sexually abused:

> [A] reasonably competent lawyer might want to avoid the appearance of bullying the witness, might believe that the complainant's testimony can best be undermined by pointing out inconsistencies with other testimony, and might want to avoid elaboration on damaging points of testimony . . . .[23]

Here, there are reasons why reasonable defense counsel may have decided not to cross-examine the son. The son's inconsistency and difficulty testifying about certain issues gave defense counsel evidence from which to argue that the son was not credible. Defense counsel may have wanted to avoid resolving those inconsistencies or elaborating on the damaging

---

[17] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[18] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[19] *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012), quoting *Strickland*, 466 US at 690 (quotation marks omitted).

[20] *Vaughn*, 491 Mich at 670; *Strickland*, 466 US at 690.

[21] *Pickens*, 446 Mich at 325.

[22] *Vaughn*, 491 Mich at 670; *Cullen v Pinholster*, 563 US ___, ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557, 578 (2011).

[23] *Gioglio*, 296 Mich App at 22-23.

aspects of the son's testimony. Further, because he was a seven-year-old child, the son may have been a compelling witness. Defense counsel may have reasonably decided that cross-examination would appear too much like bullying or that he did not want to emphasize the son's testimony. We conclude that defense counsel's decision not to cross-examine the son was objectively reasonable.

Pierce also contends that the trial court erred by failing to cross-examine Mann, the sexual assault nurse. We disagree. Again, there are reasons why an objectively reasonable attorney may have decided against cross-examining Mann.

First, Mann testified that she found no evidence that indicated the son was sexually abused and that she could not definitively say that the daughter was sexually abused. Mann also testified that other medical conditions could have caused the children's injuries. Accordingly, given Mann's equivocal testimony, defense counsel may have reasonably decided that he had enough evidence from which to discredit Mann's testimony.

Second, counsel may not have wished to further draw the jury's attention to the fact that the medical evidence potentially corroborated the children's allegations. Mann testified that the daughter had a bacterial infection that is not usually found in people who are not sexually active. Mann also testified that the daughter had anal redness and thickened tissue. Counsel may have reasonably decided that the jury was less likely to find Pierce guilty if counsel emphasized the credibility contest between Pierce and the children rather than the medical evidence.

Thus, we conclude that counsel was not ineffective for failing to cross-examine the son or Mann. Our review is limited to the record and, on this record, counsel's decision was objectively reasonable.

D. FAILURE TO CALL THE OLDEST SON

Pierce contends that counsel was ineffective for failing to investigate and call Pierce's oldest son to testify. We disagree.

Defense counsel's decisions to call and investigate witnesses are matters of trial strategy.[24] Our review is limited to mistakes apparent from the record.[25] As previously stated, we must consider the possible reasons for counsel's actions.[26]

Here, though Pierce asserts on appeal that defense counsel did not investigate the oldest son, there is no indication *in the record* that counsel failed to investigate and no record of any possible testimony the oldest son may have given. Counsel may have investigated Pierce's

---

[24] *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

[25] *Riley*, 468 Mich at 139; *Gioglio*, 296 Mich App at 20.

[26] *Vaughn*, 491 Mich at 670; *Cullen*, 563 US at ___; 131 S Ct at 1407; 179 L Ed 2d at 578 (2011).

oldest son and determined that he would not testify favorably. In that case, defense counsel's decision not to call the son would have been objectively reasonable.

Pierce also asserts that, even if the oldest son did not testify favorably, defense counsel should have called the son because it would have affected counsel's closing arguments. There is a strong reason why defense counsel may choose not to call an unfavorable witness simply to solidify counsel's closing arguments: the son's denial could have completely undermined Pierce's credibility. We will not second-guess defense counsel's decision to refrain from calling a potentially unfavorable witness.

Further, without some indication that a witness would have testified favorably, a defendant cannot establish that counsel's failure to call the witness would have affected the outcome of his or her trial.[27] Here, there is no evidence in the record that Pierce's oldest son would have testified favorably. Thus, we cannot conclude that defense counsel's decision not to call Pierce's oldest son affected Pierce's substantial rights.

We conclude that Pierce has not carried his burden of proving that defense counsel's decision not to call Pierce's oldest son to testify was objectively unreasonable or prejudicial.

IV. CONCLUSION

We conclude that Pierce has not demonstrated that prosecutorial misconduct or ineffective assistance of counsel denied him a fair trial. The prosecutor's closing argument did not constitute plain error affecting Pierce's substantial rights, and Pierce has not shown that defense counsel's decisions were objectively unreasonable or prejudicial.

We affirm.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

[27] See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).